



UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:) Case No. 09-31406-C-7
TRINISHA DANIEL TURTURICI and) Adversary No. 09-2462
DAVID ANTHONY TURTURICI,)
Debtor(s).)
_____)
DAVID ANTHONY TURTURICI and)
TRINISHA DANIELLE TURTURICI,)
Plaintiff(s),)
v.)
NATIONAL MORTGAGE SERVICING, LP,)
Defendant(s).)
_____)

MEMORANDUM DECISION ON REMAND

This court's order dismissing this adversary proceeding pursuant to an abstention, 28 U.S.C. § 1334(c)(1), was reviewed on appeal by the United States District Court for this district. By order entered August 12, 2010, the district court "reversed" because this court did not consider the twelve factors mentioned by the Court of Appeals for the Ninth Circuit in Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.), 912 F.2d 1162, 1167 (9th Cir. 1990). Accordingly, the district court remanded

1 to revisit abstention viewed through the matrix of the items
2 named in Tucson Estates.

3 There is no need for further argument or further
4 presentation by the parties because the record was complete at
5 the time the court made its initial abstention decision, and it
6 is merely the articulation of the reasons through the Tucson
7 Estates list that is needed. This court easily can perform that
8 task without further proceedings or briefs.

9 The precise precedential status of Tucson Estates, however,
10 should be noted because it is unusual. As the district court
11 mentioned, this court itself had noted the existence of the
12 Tucson Estates analysis in its decision Fidelity Nat'l Title Ins.
13 Co. v. Franklin (In re Franklin), 179 B.R. 913, 928 (Bankr. E.D.
14 Cal. 1995). The Franklin decision was issued March 31, 1995,
15 approximately eight months before the Supreme Court decided
16 Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995), in
17 which it held that a court of appeals lacks jurisdiction to
18 entertain questions of remand under 28 U.S.C. §§ 1443(d) and
19 1452(b) (bankruptcy abstention). A substantially identical
20 prohibition on court of appeals exists in 28 U.S.C. § 1334(c)(1).
21 Thus, Things Remembered and the Ninth Circuit's decision in
22 Eastport Assocs. v. City of Los Angeles (In re Eastport Assocs.),
23 935 F.2d 1071, 1075-79 (9th Cir. 1991), constitute court of
24 appeals decisions rendered without jurisdiction. Accordingly,
25 the status of those decisions as fixing the law of the Ninth
26 Circuit is open to question because the court of appeals has no
27 authority to review bankruptcy remand and discretionary
28 abstention decisions.

1 A second development since the time of the Tucson Estates
2 and Eastport decisions is that Federal Rule of Bankruptcy
3 Procedure 5011 was amended to eliminate the requirement that the
4 bankruptcy court make a report and recommendation to the district
5 court in an abstention matter.

6 Since 1995, the Tucson Estates considerations have generally
7 fallen into disuse, it being recognized that such lists of
8 factors have a meretricious tendency of beguiling parties into a
9 sense that a numerical count of the factors will yield the
10 answer. Nevertheless, the district court is entitled in a review
11 of discretionary review, 28 U.S.C. § 1334(c)(1), to require that
12 the Tucson Estates factors be expressly addressed. The court
13 understands the district court's order to impose such a
14 requirement.

15 Addressing the Tucson Estates list yields the conclusion in
16 this case that discretionary abstention under § 1334(c)(1) was
17 appropriate.

18 The first consideration is the effect or lack thereof on the
19 efficient administration of the bankruptcy estate. This factor
20 favors abstention. The litigation between the parties will have
21 no effect on the bankruptcy estate. Rather, it is between the
22 individual debtors and National Mortgage Servicing.

23 Second, the extent to which state law issues predominate
24 over bankruptcy issues favors abstention. No bankruptcy issue is
25 involved.

26 Third, the difficulty or unsettled nature of the applicable
27 law also favors abstention because a dispute governed exclusively
28 by state law is not an area of substantial controversy in the

1 context of the mortgage foreclosure crisis.

2 Fourth, the presence of a related proceeding commenced in
3 the state court also favors abstention. There is a pending
4 proceeding. Although unlike mandatory discretion under
5 § 1334(c)(2), discretionary abstention under § 1334(c)(1) does
6 not require that there be a parallel proceeding in state court,
7 there is a parallel state court proceeding.

8 Fifth, the jurisdictional basis for entertaining the dispute
9 between the parties is founded exclusively on § 1334. There is
10 no other basis for federal jurisdiction, which consideration also
11 favors abstention.

12 Sixth, the degree of relatedness or remoteness of the
13 proceeding to the bankruptcy case also favors abstention. The
14 outcome will have no effect upon the main bankruptcy case.

15 The seventh consideration also favors abstention because the
16 substance of the dispute is not a core proceeding.

17 The eighth factor favors abstention because the only claims
18 are state law claims. Thus, the potential to sever state law
19 claims from core bankruptcy matters to allow judgment to be
20 entered in state court with enforcement left to the bankruptcy
21 court does not exist.

22 The ninth factor also favors abstention because the burden
23 on the bankruptcy court's docket would be considerable in that a
24 multi-day trial in an environment in which the bankruptcy judges
25 of this district are severely overworked according to pertinent
26 judicial statistics makes entertaining a dispute that does not
27 affect the bankruptcy case a substantial, and unnecessary,
28 burden.

1 Tenth, the likelihood that the commencement of the
2 proceeding in bankruptcy court involves forum shopping by one of
3 the parties also favors abstention. The plaintiffs apparently
4 consider the bankruptcy court to be a friendlier forum as
5 evidenced by the filing of the instant complaint at a time that
6 they had a state court proceeding pending.

7 The eleventh factor favors abstention because any jury trial
8 would be more efficiently handled in state court instead of
9 before a United States District Judge.

10 The twelfth consideration also favors discretionary
11 abstention. This is a dispute between the debtors and nondebtor
12 parties.

13 Accordingly, each Tucson Estates consideration favors
14 abstention. This court remains persuaded that discretionary
15 abstention under § 1334(c)(1) is appropriate and adheres to the
16 view that the adversary proceeding should be dismissed.

17 An appropriate order will issue.

18
19 Dated: October , 2010.

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22 _____
23 UNITED STATES BANKRUPTCY JUDGE
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CERTIFICATE OF SERVICE

On the date indicated below, I served a true and correct copy(ies) of the attached document by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed and by depositing said envelope in the United States mail or by placing said copy(ies) into an interoffice delivery receptacle located in the Clerk's Office.

David Anthony Turturici
5480 Dewey Dr #150-132
Fair Oaks, CA 95628

Jeremy M. Jessup
3638 American River Dr
Sacramento, CA 95853

Dated: 10/5/10


DEPUTY CLERK
SWAS